No. 95-1873

(12)

In the Supreme Court of the United States

OCTOBER TERM, 1996

GUY Y. ADAMS, ET AL.,
Petitioners,

v.

CHARLIE FRANK ROBERTSON and
LIBERTY NATIONAL LIFE INSURANCE COMPANY,
Respondents.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF THE AMICUS CURIAE

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States. ACLI represents the interests of 580 member life insurance companies.[1] Many of ACLI's members have been subjected to putative and certified nationwide class actions, particularly in Alabama. Because class action litigation can have devastating consequences for defendants in such cases, this Court's resolution of issues such as the one presented in this case is of critical importance to ACLI and its members.[2]

SUMMARY OF THE ARGUMENT

1. It is important at the outset to clarify what issues this case does and does not present. Because every one of the petitioners either is an Alabama resident or consented to the jurisdiction of the Alabama courts by participating (either personally or through counsel) in the fairness hearing, this case does not present the important question whether a state court may exercise jurisdiction over the claims of out-of-state members of a putative class who have not received actual notice and an opportunity to opt out. Because Liberty National is an Alabama company, the case also does not present the question whether an Alabama court has personal jurisdiction over out-of-state defendants with respect to claims of out-of-state class members. Finally, because the case

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[1] Respondent Liberty National Life Insurance Company ("Liberty National") is a member of ACLI. This amicus brief has been prepared solely by counsel retained by ACLI at ACLI's expense. Liberty National has not contributed in any substantial way to the preparation of this brief.

[2] The petitioners and both respondents have consented to the filing of this brief. Their letters of consent have been lodged with the Clerk of the Court.

involves a settlement, it presents no issue of the constitutional limitations on the *adjudication* of nationwide class actions.

2. The narrow issue that *is* before the Court is whether members of a nationwide class over whom a State court has personal jurisdiction nonetheless have an absolute due process right to opt out of the class and thereby scuttle a settlement that is supported by the overwhelming majority of the members of the class and that has been approved by the trial court after a plenary fairness hearing. Application of this Court's three-part balancing test compels the conclusion that they have no such right.

First, petitioners' only constitutionally cognizable interest is in their cause of action as a whole, not in any particular remedy. The non-opt-out procedure utilized in this case has not deprived petitioners of that interest because the settlement provides them and every other member of the class with very substantial equitable relief.

Second, even if petitioners could be said to have a property interest in specific remedies, such as punitive damages or compensation for mental anguish, the risk of *erroneous* deprivation of that interest is minimal in light of the extensive procedural safeguards that petitioners were afforded — actual notice of the settlement and the opportunity to participate in discovery, file briefs, and to give testimony and cross-examine witnesses at the fairness hearing.

Third, the interests of the remaining 99.9% of the class and of Liberty National are substantial and easily outweigh those of the 0.1% of class members who seek to opt out. If petitioners are allowed to opt out and thus to pursue individual claims for millions of dollars in punitive and mental anguish damages, there is every likelihood that the settlement will be terminated and that every class member will have to fend for himself or herself. And whether or not that happens, it would take only a few large punitive and/or mental anguish awards to disable Liberty National financially and thereby

deprive the remaining class members of *any* relief at all. Nothing in the Due Process Clause requires the Alabama courts to countenance that dire result.

ARGUMENT

Nationwide class actions filed in state court represent a relatively new and challenging phenomenon. Such cases implicate a variety of significant constitutional issues ranging from personal jurisdiction to procedural due process to constitutional limitations on choice of law. As the present case comes to the Court, however, it raises only the comparatively narrow issue of whether members of a nationwide class over whom the State court has personal jurisdiction have a due process right to opt out of the class, thereby destroying what has been adjudicated to be a fair settlement of the class action, merely because the class members' claims are potentially remediable by a money judgment.

In Section A of this brief, we briefly set out some of the more significant constitutional issues that are *not* presented here and urge the Court to tailor its opinion so as not to intimate any position as to the appropriate resolution of those issues. In Section B, we discuss the considerations relevant to the Court's determination as to whether the Due Process Clause requires a State to afford individuals over whom it has jurisdiction an opportunity to opt out of a lawsuit that will bind their financial interests. It is our submission that, when, as here, there has been a settlement and a plenary fairness hearing, the State is not constitutionally required to allow such individuals to put their individual preferences ahead of those of the class as a whole and the defendant by opting out of the class and thereby jeopardizing the settlement.

A. The Court Should Refrain From Intimating A View On The Several Significant Questions That Recur In Nationwide Class Actions But That Are Not Squarely Presented Here.

Nationwide class actions in state courts present a wide range of significant constitutional issues from the perspective of both the defendants and the members of the class. Most of those issues are not squarely presented here. In this Section of the brief, we briefly identify some of the key constitutional issues that have been percolating in the state courts and respectfully urge the Court to tailor its opinion so as not to intimate any predisposition of those issues.

1. *Personal jurisdiction over out-of-state class members.* Under our federal system, a State only has power to adjudicate *in personam* legal disputes when *both* the plaintiff and the defendant have some connection with the State, such as residence, voluntary selection of the forum or "minimum contacts" with the State. Applying this overarching principle, the Court has held that a State court has the power to adjudicate the claims of non-residents who otherwise have no particular contact with the State, *if* those individuals effectively consent to the foreign forum's adjudication of their rights. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-814 (1985).

In *Shutts*, each putative class member was personally sent "a fully descriptive notice" of the class action and was given the opportunity to opt out. 472 U.S. at 812. The final class excluded all individuals who opted out as well as all individuals whose notices had been returned as undeliverable. *Id.* at 801. In view of these circumstances, the Court found it appropriate to infer that the remaining out-of-state class members had consented to the State court's jurisdiction, thus entitling the State court to adjudicate their claims. *Id.* at 812-813.

Because all of the persons ultimately included in the class received actual notice, the *Shutts* Court did not need to address the question whether "publication notice" ever can suffice to confer jurisdiction over out-of-state class members.[3] The answer to that constitutional question is of great importance, particularly given the recent dramatic increase in the number of nationwide class actions filed in State courts. See generally 3 HERBERT B. NEWBERG AND ALBA CONTE, NEWBERG ON CLASS ACTIONS § 13.46, at 13-120 (3d ed. 1992) (noting increasing number of state court class actions); Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 575 (1996) (same). We urge the Court to consider and decide that issue when it arises in a case that actually presents it.

This, however, is not such a case. The petitioners in this case either (a) are Alabama residents as to whom the Alabama courts unquestionably have *in personam* jurisdiction and/or (b) consented to jurisdiction by appearing in the trial court to object to the settlement. Thus, the State has clear power to design a procedural structure that binds their interests. Accordingly, there is no occasion here to decide whether (or under what circumstances) a State court may bind out-of-state class members who have not consented to the court's jurisdiction by appearing on the merits.

2. *Personal jurisdiction over out-of-state defendants with respect to claims of out-of-state class members.* With increasing frequency, lawyers are filing nationwide class

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[3] This issue directly affects both the putative class members and the target defendants. The absence of actual consent to the foreign forum's assertion of adjudicatory power may equip the out-of-state "class member" with the right to renounce as ineffectual any determination in that forum in favor of the defendant. *Shutts*, 472 U.S. at 805. By contrast, the putative class member could invoke a finding of liability rendered against the defendant. Thus, the issue is whether the Due Process Clause licenses the individual States to create a system of "heads, I win; tails, you lose" and to impose it on out-of-State corporate defendants.

actions in State courts against out-of-state defendants that do not have a sufficient presence in the State to afford the State courts with general jurisdiction over the defendant.[4] The state court may have specific jurisdiction with respect to the claims of the in-state class members because, for example, the defendant's conduct affected them within the State.

An entirely distinct question is whether the court may exercise jurisdiction with respect to the claims of the out-of-state class members merely because the class lawyers want to aggregate those claims with those of the in-State plaintiffs. Particularly when the in-state class members represent only a small fraction of the total class, there is considerable reason to question whether the state courts constitutionally may exercise jurisdiction over the defendant with respect to the claims of the out-of-state class members.[5]

This issue, of course, is not presented here, and the Court therefore need not address it, because Liberty National is an Alabama-based company over which the Alabama courts have general jurisdiction.

3. *Constitutional limitations on the adjudication of nationwide class actions*. Another important question that arises in nationwide class actions is whether there are constitutional limits on the kinds of cases that can be tried as class actions. In recent years, the federal circuits have been recognizing rather consistently that nationwide classes of

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[4] For a discussion of the difference between general and specific jurisdiction, see *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414 & nn. 8, 9 (1984).

[5] One such case that may be familiar to the Court is *Wilkinson v. BMW of North America, Inc.*, a putative nationwide class action seeking compensatory and punitive damages against BMW for the same conduct involved in *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996). The case was filed in Alabama state court even though Alabama residents comprise less than 1% of the putative class.

product liability and/or consumer claimants are simply unmanageable and cannot fairly be tried in that form. See, *e.g.*, *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Andrews v. American Tel. & Tel. Co.*, 95 F.3d 1014 (11th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir.), cert. granted on other issues, 117 S. Ct. 379 (1996); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069 (6th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir.), cert. denied, 116 S. Ct. 184 (1995).

With increasing regularity, however, State courts have been certifying nationwide class actions, even though the applicable laws of the different states vary in material ways and the effort to adjudicate claims of tens of thousands of putative class members under 51 legal systems cannot be achieved in any rational or manageable way. See, *e.g.*, *Ex parte Masonite Corp.*, 1996 WL 359888, at *8 (Ala. June 28, 1996) (refusing to set aside trial court's "preliminary" certification of a nationwide class of property owners and its order setting for trial the issue whether the defendant's home-siding product was defective).

The question then arises whether the fact that the case will have to be tried under myriad (and often conflicting) state laws renders the case so unmanageable and inherently confusing as to make it fundamentally unfair to require the defendant to litigate it in a single proceeding. That issue does not arise here because this case involves a settlement; when there is a settlement, there is no risk of confusing a jury with varying state laws.

B. The Due Process Clause Does Not Require A State To Exalt The Interests Of A Handful Of Objectors Who Are Otherwise Subject to the State Court's Jurisdiction Over The Broader Interests Of The Settling Class Members And Defendant.

The issue that *is* presented here is whether and to what extent dissenting members of a class (or, to be more accurate, their lawyers) can scuttle a settlement deemed by the reviewing courts to be in the best interests of the class as a whole by insisting on the right to opt out of the class. It is an unavoidable side effect of class action litigation that the lawyer(s) designated as class counsel will capture the lion's share of the fee award, which often can run into the millions of dollars. Regrettably, lawyers who have failed to reap the prized designation of class counsel often later seek to protect their own interests at the expense of the class either by directly challenging the settlement or by rounding up class members to opt out of the class, thereby threatening the settlement indirectly.[6] That is obviously what has happened here. Nothing in this Court's Due Process Clause jurisprudence requires the State courts to allow the selfish interests of a few class members and their attorneys to prevail over the interests of the class as a whole.

The Court's test for determining whether a proposed procedure is required by the Due Process Clause requires a balancing of three factors:

> [1] the private interest that will be affected by the official action; [2] the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and [3] the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). For cases like this one involving disputes between private parties, the third factor has been modified to afford "principal attention" to the interests of the private parties opposing the proposed procedure. *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991).

Application of this three-part test compels the conclusion that class members who are properly subject to a State court's *in personam* jurisdiction need not be afforded the opportunity to opt out of a class action settlement that has been approved by a trial court as fair after a plenary hearing and then reviewed and approved by a state appellate court.

1. *Petitioners' interest.* The first *Mathews* factor requires identification of the petitioners' interest. Petitioners assume (Br. 23) that they have a property interest in each of the multiple remedies that is potentially available for any conceivable claim that might be alleged against Liberty National arising out of the policy exchange program. We submit that they have no constitutionally cognizable property interest in any particular remedy but rather solely in their cause of action *as a whole*. See *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("a *cause of action* is a species of property protected by the Fourteenth Amendment's Due Process Clause") (emphasis added). Put another way, petitioners' property interest is in the overall remedial bundle, not in each particular stick in that bundle.

Indeed, a holding that each potentially available remedy is a discrete species of constitutionally protectible property would likely encourage constitutional challenges to numerous state court procedures and remedial regimes. For example, under the workers' compensation laws of most states, a

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[6] For an entertaining description of one such effort, see Amy Stevens, *The Mouthpieces: Class-Action Lawyers Brawl over Big Fees in Milli Vanilli Fraud*, WALL ST. J., Oct. 24, 1991, at A1. See also *In re Oracle Sec. Litig.*, 131 F.R.D. 688, 690-691 (N.D. Cal. 1990).

worker may not recover punitive damages or damages for pain and suffering from his or her employer; nor even is the worker entitled to the amount of damages that a jury might conclude to be fair compensation for the injury. Instead, the worker is limited to recovering from the workers' compensation fund an amount that is specified by statute or regulation in accordance with the nature of the injury.[7] If petitioners' approach were adopted, it is predictable that such regimes would be challenged on the ground that they deprive workers entirely of some potentially available remedies and sharply limit the scope of others. Nor can there be any serious doubt that such an approach would give rise to a spate of constitutional challenges to State statutes that limit punitive damages to the first prevailing plaintiff,[8] cap the amount of non-economic and/or punitive damages,[9] or allocate part of any

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[7] See generally DAN B. DOBBS, TORTS AND COMPENSATION 870-874 (2d ed. 1993).

[8] See, *e.g.*, GA. CODE ANN. § 51-12-5.1(e)(1).

[9] See, *e.g.*, COLO. REV. STAT. ANN. § 13-21-102(1)(a) (punitive damages cannot exceed amount of compensatory damages); CONN. GEN. STAT. ANN. § 52-240(b) (punitive damages in product liability action cannot exceed twice the compensatory damages); GA. CODE ANN. § 51-12-5.1(g) (in non-products liability cases, punitive damages limited to $250,000 unless defendant acted with specific intent to injure); ILL. COMP. STAT. ANN. ch. 735, § 5/2-1115.1(a) (capping non-economic damages at $500,000 per plaintiff); *id.* § 5/2-1115.05(a) (capping punitive damages at three times the economic damages); IND. CODE ANN. § 34-4-34-4 (punitive damages may not exceed greater of $50,000 or three times compensatory damages); KAN. STAT. ANN. § 60-3702(e) (as a general rule, punitive damages may not exceed lesser of defendant's annual gross income or $5 million); MD. CODE ANN. [CTS. & JUD. PROCEEDINGS] § 11-108(b) (capping noneconomic damages in personal injury and wrongful death actions at $500,000 subject to annual increases of $15,000); NEV. REV. STAT. ANN. § 42.005(1)(a), (b) (subject to enumerated exceptions, capping punitive damages at $300,000 if compensatory damages are less than $100,000 and at three times the compensatory damages if the

punitive award to the State.[10]

Even if it were appropriate to treat each individual stick in the remedial bundle as an independent species of property, the remedies that petitioners have been required to forego pursuing merit little weight in the constitutional analysis. It requires only the most modest familiarity with Alabama's legal climate to divine that the remedial stick about which petitioners are primarily concerned is punitive damages. As this Court is aware from *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589 (1996), and the four other Alabama

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compensatory damages are $100,000 or greater); N.J. STAT. ANN. § 2A:15-5.14b (punitive damages may not exceed greater of $350,000 or five times compensatory damages); N.D. CENT. CODE § 32-03.2-11(4) (punitive damages may not exceed the greater of twice the compensatory damages or $250,000); OKLA. STAT. ANN. tit. 23, § 9.1(B)-(D) (punitive damages capped at greater of $100,000 or compensatory damages unless defendant acted intentionally and maliciously, in which case the punitive damages are capped at the greatest of $500,000, twice the compensatory damages, or the benefit to the defendant); OR. REV. STAT. § 18.560(1) ($500,000 limit on non-economic damages in personal injury cases); TEX. CIV. PRAC. & REM. CODE ANN. § 41.008(b) (punitive damages limited to greater of $200,000 or twice the economic damages plus an amount equal to the non-economic damages (subject to a limit of $750,000); VA. CODE ANN. § 8.01-38.1 (punitive damages awarded against all defendants may not exceed $350,000).

[10] See, *e.g.*, FLA. STAT. ANN. § 768.73(2)(a)-(b) (35% of punitive damages allocated to the State); GA. CODE ANN. § 51-12-5.1(e)(2) (75% of punitive damages allocated to the State); ILL. COMP. STAT. ANN. ch. 735, § 5/2-1207 (authorizing court to apportion punitive damages between plaintiff and the State); IND. CODE ANN. § 34-4-34-6 (75% of punitive damages allocated to the State); IOWA CODE ANN. § 668A.1(2)(b) (under specified circumstances, 75% of punitive damages allocated to the State); KAN. STAT. ANN. § 60-3402(e) (50% of punitive damages in medical malpractice cases allocated to the State); MO. ANN. STAT. § 537.675(2) (50% of punitive damages allocated to the State); OR. REV. STAT. § 18.540(b) (60% of punitive damages allocated to the State); UTAH CODE ANN. § 78-18-1(3) (50% of punitive damages in excess of $20,000 allocated to the State).

cases that it remanded for further consideration in light of *Gore*,[11] Alabama has a well deserved reputation as the home of multimillion dollar punitive damages verdicts. Indeed, a single claim for less than $1,000 against Liberty National arising out of the policy exchange program yielded the plaintiff and her lawyers (one of whom is counsel of record for petitioners) an appetite-whetting $1 million in punitive damages. See *Liberty Nat'l Life Ins. Co. v. McAllister*, 675 So. 2d 1292 (Ala.), cert. dismissed, 116 S. Ct. 688 (1995). In short, as the trial court correctly perceived, it is the prospect of pursuing a few more big punitive hits, rather than any concern about the overall fairness of the settlement, that has motivated petitioners to demand the opportunity to opt out. Pet. App. 51a, 55a, 68a, 77a, 86a.

It is well established, however, that there is no right to punitive damages under Alabama law. See, *e.g.*, *Life Ins. Co. of Ga. v. Johnson*, 1996 WL 202543, at *14 (Ala. Apr. 26, 1996), cert. granted, vacated, and remanded on other grounds, 117 S. Ct. 288 (1996); *Ex parte Corder*, 134 So. 130, 131 (Ala. 1931); *Meighan v. Birmingham Terminal Co.*, 51 So. 775, 777-778 (Ala. 1910); *Comer v. Age-Herald Pub. Co.*, 44 So. 673, 675 (Ala. 1907). Accordingly, the fact that the settlement prevents petitioners from seeking punitive damages is not worth a feather's weight in the constitutional analysis.

Petitioners' highly speculative claims for mental anguish are only minimally more weighty. Mental anguish damages are potentially available in *every* tort case and hence potentially available in every class action sounding in tort. If the potential of obtaining such damages were entitled to substantial weight in the balancing analysis, then *every* non-opt-out

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[11] *Life Ins. Co. of Ga. v. Johnson*, 117 S. Ct. 288 (1996); *Union Sec. Life Ins. Co. v. Crocker*, 116 S. Ct. 1872 (1996); *American Pioneer Life Ins. Co. v. Williamson*, 116 S. Ct. 1872 (1996); *Ford Motor Co. v. Sperau*, 116 S. Ct. 1843 (1996).

class action sounding in tort would be vulnerable to constitutional challenge. For example, discrimination cases often are settled as non-opt-out class actions in which the relief is predominantly or exclusively equitable in nature. Yet because most victims of discrimination suffer mental anguish, petitioners' approach would make such non-opt-out settlements impossible no matter how advantageous the equitable relief afforded in the settlement may be. It would, in short, constitute a sea change in the law of class actions to hold that the potential availability of damages for mental anguish is a sufficiently weighty property interest to warrant superimposing an opt-out requirement on top of the other safeguards available in class actions.

The only remaining monetary damage that petitioners claim to have suffered is an increase in premiums. However, that damage is, if anything, more speculative than the mental anguish damages because Liberty National had every right to adjust its premiums to loss experience even if the petitioners had not exchanged policies. In any event, as the Alabama Supreme Court found, the equitable relief in this case more than makes up for the premium increases. Pet. App. 15a-16a. As a result of the settlement, every member of the class has received a "best-of-both-worlds" policy at a premium that reflects only the risk of the new policy (with its capped benefits), not that of the older policies. *Id.* at 69a (trial court finding). Moreover, that premium has been frozen since June 1993 and likely will remain frozen until a year after this case is finally resolved (see *id.* at 53a) — *i.e.*, sometime in the spring or summer of 1998. When, as here, the value of the equitable relief exceeds the potentially recoverable monetary damages, any property interest there may be in a monetary remedy is of minimal weight in the constitutional balancing.

2. *The risk of erroneous deprivation.* However petitioners's property interest is defined, the risk of erroneous deprivation of that interest is exceedingly low in view of the procedures that petitioners have been afforded. To begin

with, petitioners received actual notice of the settlement. Pet. App. 43a-45a. That notice informed them of their right to file written objections to the settlement, to testify and call witnesses at the fairness hearing, and to cross-examine the witnesses called by class counsel and Liberty National. *Id.* at 44a-45a. Petitioners took full advantage of those opportunities. *Id.* at 19a, 24a-26a, 47a-48a. In addition, the trial court provided a plenary fairness hearing, after which the court required that additional relief be added to the already generous settlement package. *Id.* at 52a-54a. Finally, the trial court made detailed findings of fact and conclusions of law that facilitated appellate review of its order certifying the class and approving the settlement. *Id.* at 21a-92a.

Given these procedural safeguards, there is no basis for concluding that the failure to afford petitioners an opportunity to opt out engendered any significant risk that they would suffer an *erroneous* deprivation of their property interests. Rather, the fairness hearing has determined that all class members will receive at least fair value for their claims.

Indeed, precisely because of the aggregation of their claims with those of the rest of the class of 400,000 policyholders, petitioners received relief that they never could have won in an individual litigation. See Pet. App. 69a (noting that the "best-of-both-worlds" reformed policy "is not generally available for purchase in the marketplace"); *id.* at 79a (noting that the relief afforded the class could not be obtained without a broad release).

3. *Respondents' interests.* The interests of Liberty National and of the class as a whole in the non-opt-out procedure utilized in this case are overwhelming. There can be no question that Liberty National has a strong interest in the non-opt-out procedure utilized in this case. Although expensive, the settlement in this case affords Liberty National closure and with it the confidence that it will be able to continue serving its millions of policyholders. By contrast, as the trial court found, allowing petitioners to opt out so that

they may each pursue damages claims against Liberty National could well jeopardize Liberty National's financial viability. Pet. App. 72a-73a.

The hundreds of thousands of class members who have not sought to opt out also have a powerful interest in preventing the petitioners from opting out. With virtually no effort on their own part, the members of the class have realized tremendous benefits as a result of the settlement, including a reformed policy that gives them the benefits of both the old policy and the new policy at an artificially low price that has remained fixed since mid-1993 and cannot be increased until a year after the Court decides this case.

On the other hand, if petitioners are permitted to opt out, the settlement will be dead. Every class member will be left to fend for himself or herself. Some might ultimately litigate and lose; some might conclude that litigating is not worth the time or money; and a few lucky ones may strike it rich. However, as the trial court found in determining that the class should be certified under Ala. R. Civ. P. 23(b)(1)(B), *all other class members* — indeed, all other Liberty National insureds — would be at grave risk not only of receiving no remedy, but also of having their insurer rendered financially unable to pay their claims. Pet. App. 72a-73a, 77a, 86a.

All it would take is a few Alabama-sized punitive damages awards to put Liberty National in financial jeopardy. Moreover, even if the Alabama courts could be counted on to enforce some limitation on the amount of punitive damages, Alabama juries are notoriously "generous" in the amount of mental anguish damages they award. The Alabama courts impose only modest restraints on such awards.[12] If even a

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[12] See, *e.g.*, *Duck Head Apparel Co. v. Hoots*, 659 So. 2d 897 (Ala. 1995) (cutting in half mental anguish awards of $4 million, $2 million, and $1 million in case involving wrongful denial of commissions); *Sperau v. Ford Motor Co.*, 674 So. 2d 24 (Ala. 1995) (jury rendered mental anguish awards of $2.5 million and $1 million, which trial court ordered

tiny fraction of Liberty National policyholders were to sue and win, the kind of mental anguish damages that could be awarded could undermine Liberty National's financial viability, thereby depriving every other member of the class of *any* remedy.[13]

As the trial court found, permitting opt outs "is not in the best interests of the Class." Pet. App. 77a. Such a procedure "would create a risk of a race to the courthouse by those permitted to opt-out in an effort to obtain for themselves alone the entirety of the constitutionally permissible punitive recovery in one or a few individual actions, and would result in the Settlement being declared a nullity, thereby depriving all class members of the substantial benefits offered by the settlement." *Ibid.* See also *id.* at 68a, 85a.

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In sum, as the trial court recognized, petitioners' interest in opting out so as to join Alabama's punitive damages lottery is a matter of "greed." Pet. App. 55a. Given the trial court's finding that the non-opt-out settlement in this case benefits the overwhelming majority of the members of the class, and given the State's personal jurisdiction over the small group of claimants seeking to opt out, the Due Process Clause does not require the State to give those few greedy class members the power to scuttle an otherwise fair settlement by opting out.

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reduced to $500,000 and $200,000, in case involving failure to disclose that minority-owned dealerships are less profitable, on average, than white-owned dealerships), cert. granted, vacated, and remanded on other grounds, 116 S. Ct. 1843 (1996).

[13] Unlike punitive damages, mental anguish damages are not subject to any kind of multiple punishment argument. Every plaintiff who sues and wins may be awarded mental anguish damages no matter how many previous plaintiffs have racked up similar awards.

CONCLUSION

The judgment of the Alabama Supreme Court should be affirmed.

Respectfully submitted.

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